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Arnold J. Janicker

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EXTENDING THE FEDERAL FRANCHISE TO THE COMMONWEALTH OF PUERTO RICO: *IGARTUA DE LA ROSA v. UNITED STATES*

ARNOLD J. JANICKER[†]

INTRODUCTION

In the United States, the right to vote has been held to be fundamental¹ and preservative of all other rights.² Though restricted at the founding of the republic,³ its scope has been consistently expanded⁴ through constitutional amendments,⁵

[†] J.D. Candidate, June 2002, St. John's University School of Law.

¹ See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

² See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (holding the right to vote is "not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights").

³ See *Reynolds*, 377 U.S. at 554-55.

⁴ See *id.* at 555.

⁵ See U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). The Twenty-Third Amendment provides:

The District constituting the seat of Government of the United States shall appoint in such a manner as the Congress may direct: A number of electors of President and Vice President . . . shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State

Id. amend. XXIII. The Twenty-Fourth Amendment provides:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Id. amend. XXIV, § 1. The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

legislative enactments,⁶ and court decisions.⁷ Although a citizen's right to vote is constitutionally protected,⁸ it is not of constitutional origin,⁹ but rather, it is a function of individual state sovereignty.¹⁰ The states, therefore, retain the right to direct the exercise of the right to vote so long as the pertinent state statutes do not violate applicable provisions of the Constitution of the United States.¹¹ As a fundamental right, any federal or state legislative or executive action alleged to infringe upon the exercise of the franchise would be subject to judicial review under strict scrutiny.¹²

Id. amend. XXVI, § 1.

⁶ See, e.g., 42 U.S.C. § 1973 (2001) (Voting Rights Act of 1965); see also *id.* § 1973ff (codifying the Uniform and Overseas Citizens Absentee Voting Act, which affords U.S. citizens relocating overseas an opportunity to vote in presidential and vice presidential elections by absentee ballot in their last state of residence prior to relocating outside of the United States).

⁷ See *Reynolds*, 377 U.S. at 554 (1964) ("A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this [constitutional protection of the right to vote] indelibly clear."); see also *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 145 (D.P.R. 2000) ("The history of the United States is largely characterized by the enfranchisement of segments within its citizenry."). This may be considered a narrow and somewhat misleading interpretation of the historic development of American jurisprudence. It is far more accurate to regard the historic development as a recognition and expansion of both an increasing number of, and protection for, individual liberties. See, e.g., *Roe v. Wade*, 409 U.S. 817 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1964); *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953). One such liberty is the right to vote.

⁸ See *Reynolds*, 377 U.S. at 554 ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.").

⁹ See *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) (noting that while it is the states' province to establish qualifications for voting, they do not have the power to grant or withhold such power in violation of the Constitution).

¹⁰ See *id.* at 647 ("[T]he States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment."). Implicit in this statement is the notion that it is within the power of the state to withhold the franchise, so long as the conditions of the denial comport with the protections of the Fourteenth Amendment. Thus, the right to vote is extended to the citizen through the sovereign powers of the individual states. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (noting that while sovereignty is "not subject to law" and remains with the people, sovereign powers are delegated to divisions of government and limited by the Constitution).

¹¹ See *Morgan*, 384 U.S. at 647 (holding the states can regulate qualifications of voters to the extent the regulations do not infringe on the rights of its individual citizens protected by the Fourteenth Amendment).

¹² See, e.g., *Burdik v. Takushi*, 504 U.S. 428, 434 (1992) (stating that judicial review at a level of strict scrutiny is reserved for legislation alleged to either infringe on rights held to be fundamental, or adversely impact suspect population classes). In order to meet its burden and to preserve the contested legislation, the

Despite the fundamental nature of the right to vote, and the subsequent judicial protections contingent upon it, not all United States citizens can vote for President or Vice President.¹³ Citizens residing in any of the several territories belonging to the United States¹⁴ are effectively denied the right to vote in presidential and vice presidential elections¹⁵ due to express provisions in the Constitution of the United States.¹⁶ These provisions grant the right to vote to the several states, rather than to individual citizens of the United States.¹⁷ Consequently, United States citizen residents of the territories have a fundamental right to vote,¹⁸ but are excluded from participation in presidential elections because of their territorial residency.¹⁹

government must show the classification or action is necessary to promote a compelling government interest and the act must be narrowly tailored to meet the government's objectives. *See id.* Meeting this burden is extremely difficult, but not impossible. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld the internment of U.S. citizens of Japanese descent during World War II. *See id.* at 219. When viewed in contemporary context, *Korematsu* is a highly suspect decision and sometimes seen as a product of post Pearl Harbor hysteria. In the context of 1944, the security interest of the United States, without knowing how the war would end, could be seen as being jeopardized by concerns for espionage and sabotage, as such, the decision can be justified.

¹³ *See Attorney General of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (holding U.S. citizens residing in the territories cannot vote in presidential or vice presidential elections).

¹⁴ *See Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 447 (1992) (identifying U.S. flag territories as the Territory of American Samoa, the Territory of Guam, the Commonwealth of the Northern Marianas Islands, the Territory of the U.S. Virgin Islands, and the Commonwealth of Puerto Rico). It should be noted the differences between "commonwealth" and "territory" are irrelevant with respect to presidential or vice presidential elections. Neither a commonwealth or a territory is a state, nor are either treated as such for these purposes.

¹⁵ For simplicity, subsequent reference to the presidential election will include the concurrent vice presidential election.

¹⁶ *See U.S. CONST.* art. II, § 1 (granting the right to vote for the President to the states through the power to appoint electors at the discretion of the state legislature).

¹⁷ *See Attorney General of Guam*, 738 F.2d at 1019 (noting that although the holding was specific to the Territory of Guam, it has been held to apply to all U.S. flag territories where the issue of participation in presidential elections by territorial residents has been litigated); *see also Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994); *Romeu v. Cohen*, 121 F. Supp. 2d 264 (S.D.N.Y. 2000) (holding U.S. citizen residents of Puerto Rico cannot vote in presidential elections because of Article II, Section 1, not because of the alleged unconstitutionality of the Voting Rights Act or Uniform and Overseas Citizens Absentee Voting Act).

¹⁸ *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

¹⁹ *See Attorney General of Guam*, 738 F.2d at 1019 (holding territorial residents

Recently, in *Igartua de la Rosa v. United States*,²⁰ the United States District Court for Puerto Rico addressed the seemingly conflicting propositions between authorities holding the right to vote to be fundamental,²¹ and the express provisions of Article II, Section 1 of the Constitution of the United States.²² The *Igartua de la Rosa* court radically departed from case law²³ in interpreting the express provisions of the Constitution²⁴ and finding that United States citizen residents of Puerto Rico²⁵ have a fundamental right to vote in presidential elections.²⁶ Furthermore, the court ordered steps be taken to implement a voting scheme and to have the vote totals included in the final

cannot vote in presidential elections because Guam is not a state).

²⁰ 113 F. Supp. 2d 228 (D.P.R. 2000), *rev'd*, 229 F.3d 80 (1st Cir. 2000). The entire matter at the district court level is comprised of two decisions. The first, *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140 (D.P.R. 2000), is an opinion and order dated July 19, 2000, containing a "substantial discussion of the merits." In a second decision, *Igartua de la Rosa v. United States*, 113 F. Supp. 2d 228, 231 (D.P.R. 2000), the court specifically held that U.S. citizen residents of Puerto Rico had a fundamental right to vote for President and Vice President of the United States and stated: "the Court hereby adopts and incorporates said opinion and order [contained in *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140 (D.P.R. 2000)] to form part hereof and to be read together herewith." For simplicity, each part of the opinion will be cited respectively as elements of each are discussed. Additionally, the reader should be aware of *Igartua de la Rosa v. United States*, 842 F. Supp. 607 (D.P.R. 1994), *aff'd*, 32 F.3d 8 (1st Cir. 1994), in which the same lead plaintiff as in the instant matter litigated a substantially similar claim. *See* *Igartua de la Rosa v. United States*, 229 F.3d 80, 84 (1st Cir. 2000) (holding the claim in the 2000 case was the same that was raised in 1994).

²¹ *See Reynolds*, 377 U.S. at 555 (expressing a sense of the sanctity of the vote).

²² U.S. CONST. art. II, § 1.

²³ *See Romeu v. Cohen*, 121 F. Supp. 2d 264 (S.D.N.Y. 2000) (holding U.S. citizen residents cannot vote in presidential elections because of Article II, Section 1, not because of the alleged unconstitutionality of either the Voting Rights Act or the Uniform and Overseas Citizens Absentee Voting Act); *Igartua de la Rosa*, 842 F. Supp. at 607 (holding claim for declaratory judgment on ability of U.S. citizen residents of Puerto Rico to vote in presidential elections because Puerto Rico had become a *de facto* state presented a non-justiciable political question), *aff'd*, 32 F.3d 8 (1st Cir. 1994) (holding the right to elect a President is held by the several states, not individual citizens); *Attorney General of Guam*, 738 F.2d at 1020 (holding that as residents of Guam, U.S. citizens cannot vote in presidential elections as Guam is not a state); *Sanchez v. United States*, 376 F. Supp. 239 (D.P.R. 1974) (stating that a claim made by a U.S. citizen resident of Puerto Rico, that keeping him from the presidential ballot box was unconstitutional, was deemed to be "meritless" by the court and was dismissed due to the language of Article II, Section 1).

²⁴ *See* U.S. CONST. art. II, § 1.

²⁵ *See* 8 U.S.C. § 1402 (1989) (granting U.S. citizenship to residents of Puerto Rico).

²⁶ *See* *Igartua de la Rosa v. United States*, 113 F. Supp. 2d 228, 242 (D.P.R. 2000).

tally of the Electoral College.²⁷ Standing squarely on judicial precedent holding the right to vote to be fundamental,²⁸ the district court courageously asserted the right to vote is a function of United States citizenship, inherent in and derived from the Constitution rather than residence in a particular venue. On appeal, the judgment of the district court was reversed, vacated, and the case remanded with instructions to dismiss the action with prejudice.²⁹

Despite the brief interval between the district court opinion and the subsequent reversal at the appellate level, the district court's holding remains important as it questions not only the foundation of the political relationship between the United States and Puerto Rico, but also the traditional judicial interpretation of both the origin and political underpinnings of a citizen's right to vote. Moreover, the district court's analysis of Article II, Section 1 as a mere mechanism is an additional cause for reflection given the results of the 2000 presidential election.³⁰ Most importantly, the district court's holding is forcing an evaluation of a remaining bastion of inequality in American society. This inequality is the distinct, and outrageous disparity in United States citizenship, as reflected in the scope of the right to vote for U.S. citizens residing in one of the several states as compared to U.S. citizens residing in one of the several territories.

In *Igartua de la Rosa*, plaintiffs³¹ asked for declaratory relief

²⁷ See *id.*

²⁸ See *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 148 (D.P.R. 2000) (citing *Westbury v. Saunders*, 376 U.S. 1, 17–18 (1964)).

²⁹ See *Igartua de la Rosa*, 229 F.3d 80, 85 (1st Cir. 2000).

³⁰ In the closest presidential election since 1960, Vice President Albert Gore Jr. won the national popular vote with a plurality of over 500,000 votes, and Texas Governor George W. Bush (now President of the United States) won by five votes in the Electoral College by securing a narrow plurality in the state of Florida. See Edward Walsh & Juliet Eilperin, *Gore Presides As Congress Tallies Votes Electing Bush*, WASH. POST, Jan. 7, 2001, at A1 (noting several last minute objections brought by members of the House to the official tally of Electors). Having “two winners” prompted a call for the elimination of the Electoral College, and a promise by Hillary Rodham Clinton, the junior Senator from the State of New York, to introduce legislation to do so. See Peter G. Fitzgerald, *Electoral College Doesn't Need Fixing*, CHICAGO SUN-TIMES, Jan. 6, 2001, at 10 (noting Senator Clinton has been joined in her effort to eliminate the Electoral College by Senator Richard Durbin and Representative Ray LaHood).

³¹ See Compl. 2–4 (identifying plaintiffs as six individuals who were currently United States citizens and residents of Puerto Rico, who had previously voted in presidential elections based on prior residency in one of the several states, and five

designed to "redress the deprivation of rights and privileges secured [to] plaintiffs and all other U.S. Citizens residents of Puerto Rico, under the Constitution of the United States of America to vote in presidential elections."³² Specifically, plaintiffs claimed the Constitution of the United States and the International Covenant on Civil and Political Rights,³³ a treaty to which the United States is a party, guaranteed their right to vote in presidential elections.³⁴ The complaint also alleged violations of several other constitutional protections,³⁵ and asked

individuals who were currently United States citizens and residents of Puerto Rico, who had never voted in presidential elections, as they had never resided in any of the several states). The distinction between plaintiffs was for the purpose of challenging the constitutionality of 42 U.S.C. § 1973ff (2001) (Uniform and Overseas Citizens Absentee Voting Act), which the court dismissed. Plaintiffs also asserted to represent all other similarly situated persons, without seeking class certification.

³² Compl. 1.

³³ See 6 I.L.M. 368 (1967) (dismissing this part of the claim, the court did not break with the First Circuit Court of Appeals rationale in *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), as it did with that court's interpretation of Article II, Section 1 of the Constitution).

³⁴ See *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 141 (D.P.R. 2000). Additionally, the first group of plaintiffs questioned the validity of the Uniform and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff, which permits United States citizens, who relocate overseas, to participate in presidential elections by absentee ballot "in their last state of residence" and does not afford the same protection to U.S. citizens who move to Puerto Rico as the act expressly includes Puerto Rico within the United States, thereby disqualifying its residents as overseas voters. See *id.* § 1973ff-6.

³⁵ See Compl. at 37-38. The plaintiffs requested the court to declare that the denial of their right to participate in presidential elections as well as the denial to all other citizen residents of Puerto Rico:

- 1) denies or abridges the inherent constitutional protections of these citizens to vote for their President and Vice President;
- 2) denies or abridges the inherent constitutional right of these citizens to enjoy their [right of] free movement across State lines;
- 3) denies or abridges the privileges and immunities granted to these citizens as to all other U.S. citizens under Article IV, Section 2, Clause 1, of the Constitution;
- 4) may have the impermissible purpose of [or] effect of denying these citizens the right to vote for President and Vice President because of the way they may vote;
- 5) has the effect of denying to these U.S. citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the Fourteenth Amendment;
- 6) is in conflict with Defendant's 1952 democratic commitment to all the American citizens residents of Puerto Rico;
- 7) does not bear a reasonable relationship to any compelling national interest in the conduct of presidential elections; and
- 8) is contrary to the treaty obligations and international policies of

for a declaration of the rights of the parties, and whatever equitable relief the court deemed proper.³⁶ The United States moved to dismiss the complaint based on *res judicata* and *stare decisis*.³⁷

In ruling on the defendant's motion to dismiss, Senior District Court Judge Jamie Pieras, Jr. issued a detailed opinion holding that as U.S. citizens, residents of Puerto Rico have a fundamental right to vote for President because such is a "function of citizenship."³⁸ Further, Article II, Section 1 does not preclude U.S. citizen residents of Puerto Rico from voting in presidential elections.³⁹ Rather, that section "merely sets forth the mechanism by which the right to vote will be implemented in the states,"⁴⁰ and has no territorial application.⁴¹ Accordingly, U.S. citizen residents of Puerto Rico have always had a right of access to the federal ballot box,⁴² despite a "strict reading of Article II of the Constitution,"⁴³ which served to bar the exercise of this right. By holding that "the Constitution itself provides that right,"⁴⁴ the court also stated that the right to vote for President preexisted any requisite constitutional amendment needed to extend the federal franchise to Puerto Rico.⁴⁵

After the ruling on the initial motion, the Governor of Puerto

Defendant applicable to voting rights of its American citizens, and to promoting democracy, [and] government by consent for citizens of other countries.

Id.; see also *Romeu v. Cohen*, 121 F. Supp. 2d 264, 268 (S.D.N.Y. 2000) (containing a similar complaint and requesting similar relief).

³⁶ See Compl. at 38–39.

³⁷ See *Igartua de la Rosa v. United States*, 229 F.3d 80, 82 (1st Cir. 2000). The defendant's motion to dismiss claimed the allegations in the instant complaint were the same as those contained in *Igartua de la Rosa v. United States*, 842 F. Supp. 607 (D.P.R. 1994), *aff'd*, 32 F.3d 8, 9 (1st Cir. 1994).

³⁸ *Igartua de la Rosa*, 107 F. Supp. 2d at 145.

³⁹ See *id.*

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² See *id.* at 148.

⁴³ *Id.* at 144–45 (distinguishing the rationale of the First Circuit Court of Appeals in *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), and of the Ninth Circuit Court of Appeals in *Attorney General of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984).

⁴⁴ *Id.* at 148.

⁴⁵ See, e.g., U.S. CONST. amend. XXIII, § 1 (granting electors to the District of Columbia in an amount not to exceed the amount the least populous State would be entitled to, and in so doing, enfranchising the citizens of the District of Columbia to vote in presidential elections).

Rico, Pedro Rossello, filed a motion to intervene in support of the plaintiffs, which was granted by the district court.⁴⁶ The United States again defended based on *res judicata* and *stare decisis*, as in the original motion to dismiss.⁴⁷ Additional defenses were also asserted, including: the plaintiffs lacked standing because their injuries were not redressable; the matter was a non-justiciable political question; and plaintiffs' complaint failed to state a claim upon which relief could be granted.⁴⁸

The district court entered final judgment in the matter and concluded:

[I]n the land of the free freedom shall prevail, the Court hereby:

1) Finds that the United States Citizens residing in Puerto Rico have the right to vote in Presidential elections and that its electoral votes must be counted in Congress;

2) Finds that the Government of Puerto Rico has the obligation to organize the means by which the United States citizens residing in Puerto Rico will vote in the upcoming and subsequent Presidential elections and to provide for the appointment of Presidential electors and orders the Government of Puerto Rico to act with all possible expediency to create such a mechanism;

3) Orders the Government of Puerto Rico to inform the Court of all developments related to its implementation of the Presidential vote until the votes are counted pursuant to the Twelfth Amendment to the Constitution.⁴⁹

With this order, the district court swept away the old barriers that functioned to keep United States citizen residents

⁴⁶ See *Igartua de la Rosa v. United States*, 113 F. Supp. 2d. 228, 230 (D.P.R. 2000). The Governor also intervened in an almost simultaneous and similar suit brought in the Southern District of New York. See *Romeu v. Cohen*, 121 F. Supp. 2d 264, 268 (S.D.N.Y. 2000).

⁴⁷ See *Igartua de la Rosa*, 113 F. Supp. 2d. at 230.

⁴⁸ See *id.* The defenses raised by the United States are similar in that they are fruit of the same tree, albeit with subtle distinctions. Standing questions the ability of the plaintiff to bring the claim, whereas the political question doctrine focuses on the nature of the claim. The political question doctrine prefaces non-justiciability partly on the inability of a court to fashion a remedy, which is similar to the final asserted defense of failure to state a claim upon which relief could be granted. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 489 (1996) (setting forth the difference between standing and the political question doctrine and noting the importance of this distinction in constitutional theory).

⁴⁹ *Id.* at 242.

of Puerto Rico disenfranchised for the purposes of the presidential election, and ordered Congress to count the electors appointed in a manner selected by the government of Puerto Rico.⁵⁰

The United States subsequently appealed to the First Circuit Court of Appeals, which found there was binding precedent within the circuit.⁵¹ The court took the view that conditions giving rise to the current litigation were essentially unchanged since its earlier decision.⁵² Moreover, the court held that the district court failed to sufficiently and properly distinguish the two cases.⁵³ As such, the First Circuit Court of Appeals stood by its earlier ruling and failed to treat the current litigation substantively. Consequently, the United States prevailed and the Government of Puerto Rico was forced to cancel plans for participating in the presidential election.⁵⁴

It is submitted that the district court in *Igartua de la Rosa* erred in its legal analysis by: 1) misinterpreting existing case law regarding the fundamental nature of the right to vote; 2) incorrectly distinguishing Article II, Section 1 as a mechanism by which the citizens of the several states express their choice for President, rather than the constitutionally proscribed method for presidential selection; and, 3) violating the political question doctrine by rendering a decision on a non-justiciable political question. It is further submitted that the First Circuit Court of

⁵⁰ See *id.* at 241 ("The court, however, will enter a declaratory judgment in accordance with this opinion and order that the United States citizens residing in Puerto Rico may vote in Presidential elections and that their votes must be counted in Congress.").

⁵¹ See *Igartua de la Rosa v. United States*, 229 F.3d 80, 85 (1st Cir. 2000).

⁵² See *id.* at 83 ("Since our decision in *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994), Puerto Rico has not become a state, nor has the United States amended the Constitution to allow United States citizens residing in Puerto Rico to vote for President . . .").

⁵³ See *id.* at 84. The court stated,

The district court attempted to distinguish *Iguarta I* [*Iguarta de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994)] in its July 19 opinion [*Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 145 (D.P.R. 2000)] (but not its Final Opinion and Order) on reasoning that while *Iguarta I* centered on Plaintiffs' inability to vote for the President and Vice President, the instant case revolves around their inability to elect delegates to the [E]lectoral [C]ollege. This effort at distinguishing *Igartura I* obviously fails.

Id.

⁵⁴ See *Igartua de la Rosa*, 229 F.3d 80, 83 (explaining how the Legislature of Puerto Rico enacted a law for the purpose of allowing U.S. citizen residents of Puerto Rico to vote in the presidential election).

Appeals erred in its failure to rule on the merits of the case due to the egregious nature and scope of the error committed by the district court. In conclusion, the district court's holding illustrates a pressing need to resolve both the issue of presidential voting rights for territorial residents, and the inconsistency between case holdings declaring the fundamental nature of the right to vote and strictly reading Article II, Section 1. Such a resolution could be accomplished best by providing for direct election of the President, with participation prefaced on U.S. citizenship, rather than on state residency, as in the current Electoral College system.

Part I of this Comment addresses the errors of the district court in *Igartua de la Rosa* with respect to: the misinterpretation and subsequent misapplication of case law that delineates the right to vote; the function of Article II, Section 1; and the political question doctrine. Part II of this Comment examines the failure of the First Circuit Court of Appeals to address the fundamentally flawed legal analysis contained in the district court's opinion. Part III of this Comment addresses the fundamental principals expressed by the district court in *Igartua de la Rosa* as they illustrate the need to address the inequalities between citizen residents of the several states and the citizen residents of the several territories with respect to voting rights as justification for the suggested remedy. In this regard, the holding of the district court in *Igartua de la Rosa* remains vital well beyond its reversal by the First Circuit Court of Appeals, and the principles espoused in it must not be obscured by an erroneous legal rational.

I. THE ERRONEOUS RULING BY THE DISTRICT COURT

A. Case Law Delineating the Right to Vote

The Constitution of the United States does not expressly grant United States citizens the right to vote.⁵⁵ As with the right to privacy,⁵⁶ the right to free movement,⁵⁷ and the right of a

⁵⁵ See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 962 (1997) (stating that although the right to vote receives constitutional protection, "there is no substantive constitutional right to vote for any state or federal office").

⁵⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1964) (deriving the right to privacy from the "penumbra" of rights expressly afforded by the Constitution).

parent to raise one's child without undue interference from the state,⁵⁸ the right to vote has an amorphous and unspecified origin.⁵⁹ Rather than grant the right to individual citizens, the Constitution protects the rights of individual citizens to exercise the franchise in two ways. First, the Constitution prohibits the traditional exclusion of certain groups from participation in the electoral process.⁶⁰ Second, the Constitution guarantees, through the doctrine of equal protection, the right of any qualified citizen to vote with all other qualified citizens,⁶¹ to have his or her vote counted,⁶² and have his or her vote afforded equal weight with all other legally cast votes.⁶³ Consequently, the denial of the right to vote has been recognized as effectuated by both debasement through improper apportionment and outright denial of exercise of the franchise.⁶⁴ Thus, it is the guarantee of equal protection afforded the individual citizen that makes the

⁵⁷ See *Crandall v. Nevada*, 73 U.S. 35, 47 (1867) (indicating that the right to free movement is rooted in federalism); see also *Kent v. Dulles*, 357 U.S. 116, 125 (1957) (declaring the right to travel is part of the liberty interest protected by the Fifth Amendment).

⁵⁸ See *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923) (recognizing that the right to raise children is part of the liberty interest protected by the Fourteenth Amendment).

⁵⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 82-83 (1973) (Marshall, J., dissenting) ("[T]he right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee.").

⁶⁰ See, e.g., U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude."); see also *id.* amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of sex."). Arguably, these amendments have principles of equal protection as their roots.

⁶¹ See *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (recognizing the Constitutional Protection of all qualified citizens' right to vote).

⁶² See *id.* at 555 (citing *United States v. Classic*, 313 U.S. 299, 315 (1941)) (defining the right to vote as "the right of qualified voters within a state to cast their ballots and have them counted") As Justice Douglas stated:

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted . . . It also includes the right to have the vote counted at full value without dilution or discount.

South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting).

⁶³ See *Rodriguez*, 411 U.S. at 34 n.74 (1973) (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)) ("[T]he Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

⁶⁴ *Reynolds*, 377 U.S. at 555 (1964).

right to vote fundamental, not an inherent quality of that right.⁶⁵

Despite its fundamental and almost inviolable nature, the right to vote is not limitless.⁶⁶ It has been judicially recognized that Congress has express constitutional powers to regulate federal elections.⁶⁷ It has also been judicially recognized that the several states retain powers to regulate state elections.⁶⁸ Both congressional and state regulatory authority is bound by the terms of the constitutional protections⁶⁹ afforded citizens as expressed in certain constitutional amendments.⁷⁰ Consequently, the right to vote has retained its geographic foundation,⁷¹ which can be traced to the federal nature of the

⁶⁵ See Gardner, *supra* note 55, at 962.

⁶⁶ See Katzenbach v. Morgan, 384 U.S. 641, 646 (1966) (holding the states retain the right to proscribe minimal durational residency requirements to prevent vote fraud provided the statutes are narrowly proscribed to meet the state objective).

⁶⁷ See Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970) ("Congress can fix the age of voters in national elections, such as congressional, senatorial, vice-presidential and presidential elections, but cannot set the voting age in state and local elections.").

The Times, Places and Manner of holding elections for Senators and Representatives, shall be proscribed in each state by the legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators of Congressional power to regulate federal elections is rooted in Article I, Section 4 of the U.S. Constitution.

U.S. CONST. art. I, § 4. It can be argued this congressional power, in conjunction with that conferred by U.S. CONST. art. I, § 8 (Necessary and Proper Clause) received a liberal interpretation by the court in an effort to breath life into legislation such as the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965), which was enacted in the face of fierce opposition as to what was perceived by many as encroachment into an area of authority retained by the several states. See, e.g., *Morgan*, 384 U.S. 641 (1966).

⁶⁸ See *Mitchell*, 400 U.S. at 118 (holding the federal government could not force the states to adopt "the 18 year old vote provisions of the Voting Rights Act of 1970" for the purposes of state elections).

⁶⁹ See *Morgan*, 384 U.S. at 648 ("[T]he States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment.").

⁷⁰ See, e.g., *Harper v. Virginia Bd. of Elections* 383 U.S. 663, 672 (1965) (holding the Equal Protection Clause forbids certain state legislation restricting the right to vote); *Carrington v. Rash*, 380 U.S. 89 (1966).

⁷¹ But see *Evans v. Cornman*, 398 U.S. 419 (1970) (holding unconstitutional a Maryland law that disenfranchised Maryland residents living on the grounds of the National Institute of Health once the grounds were ceded to the federal government by the state of Maryland). This case seemed to disregard venue, in that the grounds became federal property and, technically, no longer a part of the state of Maryland. The court however, recognized that such hyper-technical readings were not valid, and as a result, the state statute was struck down. The district court in *Igartua de*

republic. As such, the political status of the venue remains a viable constraint upon the scope of the right to vote.⁷²

The *Igartua de la Rosa* court erred by maintaining the right to vote was afforded by the Constitution rather than protected by the Constitution,⁷³ and by relying on the "evolution of constitutional thought" regarding the right,⁷⁴ as well as the bilateral nature of a representative government,⁷⁵ rather than relying upon constitutional and legal principles.⁷⁶ The court cited instances where the Constitution had to be amended in order to adapt to the changing societal view as to whom the right should apply,⁷⁷ yet failed to recognize that these amendments extended protection of the franchise to certain un-enfranchised groups⁷⁸ and extended the franchise itself to populations previously excluded by operation of the Constitution.⁷⁹ In so

la Rosa misconstrued this fact-specific case to stand for the general proposition that "territoriality is not determinative of a citizen's right to vote in the elections that affect him or her." *Igartua de la Rosa v. United States*, 113 F. Supp. 2d 228, 233 (D.P.R. 2000).

⁷² See *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 142 (D.P.R. 2000) (citing *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922)) (holding the rights that accompany American citizenship are a function of the political status of the venue in question). *Balzac* is also referenced as included in the "Insular Cases," which defined the extent to which the U.S. Constitution "followed the flag" as the United States acquired an overseas colonial empire resulting from the Spanish American War of 1898.

⁷³ See *Igartua de la Rosa*, 107 F. Supp. 2d at 148. But see *Reynolds v. Sims*, 377 U.S. 554, 554 (1964) (stating "the Constitution of the United States protects the right of all qualified citizens to vote in state as well as federal elections"). It must be stated there is a fundamental difference in "protect" and "provide" that goes beyond mere semantics. Moreover, the court in *Igartua de la Rosa* failed to consider "qualified" as it modifies "citizen." It can be argued this language recognizes certain, although unexpressed restrictions, on the right to vote regardless of citizenship. The U.S. citizen residents of Puerto Rico are not qualified by reason of the restrictions placed upon them by the political status of Puerto Rico, a fact the district court recognized, yet discounted. See *Igartua de la Rosa*, 107 F. Supp. 2d at 148.

⁷⁴ *Igartua de la Rosa*, 107 F. Supp. 2d at 147-48 ("The court finds that the evolution of constitutional thought can only lead to the inevitable conclusion that United States citizens residing in Puerto Rico have always had the right to enter the ballot box.").

⁷⁵ See *id.* at 147 ("The United States citizens residing in Puerto Rico are subject to the laws of the United States and therefore have a vested interest in participating in Presidential elections.").

⁷⁶ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁷⁷ See *Igartua de la Rosa*, 107 F. Supp. 2d at 145-46.

⁷⁸ See U.S. CONST. amend. XIV (granting the right to vote to those previously held in a condition of servitude).

⁷⁹ See U.S. CONST. amend. XXIII (granting the District of Columbia the right to appoint, in a manner to be determined by Congress, electors equal to the entire

doing, the court discounted the purpose of,⁸⁰ and need for the Twenty-Third Amendment,⁸¹ which gave the citizens of the District of Columbia the right to vote in the presidential elections.⁸²

Significantly, the court's interpretation of the right to vote as a function of the "bilateral nature of a representative government"⁸³ assumes the extension of voting rights to be germane to that relationship.⁸⁴ With this assumption, the court ignored the fact that the representative government of the United States was established without granting its citizens the

number that it would be entitled to if it were a state, but "in no event more than the least populous state" for the purposes of presidential elections).

⁸⁰ See H.R. REP. NO. 86-1698 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1459, 1460 ("The purpose of this proposed constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States.").

⁸¹ See *Igartua de la Rosa*, 107 F. Supp. 2d at 148 (adopting the underlying arguments supporting the Twenty-Third Amendment. The court analogized the duties of citizenship and significant sacrifices of U.S. citizen residents of Puerto Rico made on the nation's battlefields to those of the residents of the District of Columbia, which were used as justification for the Twenty Third Amendment); *see also* H.R. REP. NO. 86-1698 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1459, 1460 ("They have fought and died in every U.S. war since the District was founded."). Although the analogy strongly supports a similar extension of presidential voting rights to U.S. citizen residents of Puerto Rico, the court chose to embrace the underlying rationale and not the legal reasoning necessitating an amendment.

⁸² See H.R. REP. NO. 86-1698 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1459, 1460.

[V]oting rights are denied District citizens because the Constitution provides machinery only through the states for the selection of the President and Vice President. In fact, all national elections including those for Senators and Representatives are stated in terms of the States. Since the District is not a State or a part of a State, there is no machinery through which its citizens may participate in such matters. It should be noted that, apart from the Thirteen Original States, the only areas which have achieved national voting rights have done so by becoming States as a result of the exercise by the Congress of its powers to create new States pursuant to article IV, section 3, clause 1 of the Constitution.

Id.

⁸³ *Igartua de la Rosa*, 107 F. Supp. 2d at 146 (expressing a social compact or contractual approach to the relationship between a state and its citizens).

⁸⁴ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he right to vote is not a natural right, but a political one, granted by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because it is preservative of all other rights."). The assumption by the district court in *Igartua de la Rosa* ignores the recognition inherent in *Yick Wo* that granting the right to vote is a volitional act on the part of a society, rather than an innate aspect of the "benefit of the bargain" gained by those entering into an arrangement of representative government.

right to vote for its chief executive,⁸⁵ except to the extent that it was provided for by a state legislature.⁸⁶ The court failed to distinguish or recognize that the extent of the right to vote remains contingent upon constitutional provisions,⁸⁷ principles of federalism,⁸⁸ and the separation of powers, which were an essential part of the founding of the republic. By relying on "the evolution of constitutional thought,"⁸⁹ the court failed to recognize that this evolution had not yet reached those with the means necessary to effect change for the U.S. citizen residents of Puerto Rico.⁹⁰ Moreover, the district court's flawed analysis of the right to vote manifested itself into an equally flawed analysis of the function of Article II, Section 1 of the Constitution of the United States.

B. The Constitutional Dimensions of the Right to Vote For President

Article II of the Constitution of the United States

⁸⁵ See H.R. REP. NO. 86-1698 (1960), *reprinted in* 1960 U.S.C.C.A.N. 1459, 1460 (noting the language speaks of "areas which have achieved national voting rights" rather than citizens).

⁸⁶ See U.S. CONST. art. II, § 1. Placing the presidential selection process in the Constitution resulted in preventing any substantive change in the process through the normal actions of any coordinate branches of government, and served to insure stability by necessitating an overt textual change of the Constitution as provided for by Article V. By placing the authority to alter the Constitution in either a two-thirds majority of both houses of Congress and subsequent approval of a supermajority of three-fourths of the state legislatures, or approval of a supermajority of three-fourths of the state legislatures to call a constitutional convention, the judiciary is relegated to a reactionary role through judicial review of any action, provided a challenge is presented within the parameters of Article III. The holding of the district court in *Igartua de la Rosa* effectively makes the judiciary proactive, as the remedy provided plaintiffs ignored the need to alter the text of the Constitution and effectively rendered the constitutionally proscribed role of the other coordinate branches of the federal government superfluous.

⁸⁷ See U.S. CONST. art. II, § 1.

⁸⁸ See *id.* (noting that the distribution of the power to choose the chief executive to the states reflects the federal nature of the republic and the concept of a limited national authority, with individual states retaining certain powers reserved as a function of their individual sovereignty as well as a mechanism to control the power of the national authority).

⁸⁹ *Igartua de la Rosa*, 107 F. Supp. 2d at 148. In this instance, the evolution of constitutional thought has collided with viable provisions of the Constitution that must be overridden in accordance with the terms of Article V, or there is the appearance of holding certain parts of the Constitution unconstitutional when examined from the new perspective gained from "the evolution of constitutional thought."

⁹⁰ See U.S. CONST. art V.

establishes the office of President and Vice President of the United States. It proscribes concurrent terms of four years for both officers and the manner in which they are to be chosen.⁹¹ The specific procedures for presidential and vice presidential elections are set forth as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.⁹²

The electors, as chosen, then meet in the several states to vote by ballot for representatives to fill the respective offices.⁹³ Once the votes are cast in the states, the ballots are tallied and "transmit[ted] sealed to the Seat of the Government of the United States, directed to the President of the Senate."⁹⁴ The President of the Senate, in the presence of the House of Representatives, counts the ballots and certifies a winner.⁹⁵ Article II, Section 1, Clause 3 includes provisions for breaking a tie by a vote of the states in the House of Representatives, with each state delegation having one vote, as well as tie breaking provisions by the Senate, in case of a tie in the House of Representatives.⁹⁶ Article II also gives Congress the right to determine the time of choosing electors, and the day they report their votes, provided the day is the same throughout the United States.⁹⁷

⁹¹ See U.S. CONST. art. II, § 1, cl. 1.

⁹² *Id.* cl. 2; see also 3 U.S.C. § 1 (2000) (containing statutory provisions effectuating the terms of article II).

⁹³ See U.S. CONST. art. II, § 1, cl. 3. Prior to passage of the Twelfth Amendment, the electors voted for two persons, and at least one could not be an inhabitant of their state. A tally was taken, recorded, and transmitted to the President of the Senate, who in front of the House of Representatives would count the ballots, certifying the winner as President and the second place finisher as Vice President. The Twelfth Amendment provided for two distinct votes by each elector, with one ballot cast for a person to be President and a second ballot cast for a person to be vice president. For a concise analysis of the impact of the Twelfth Amendment upon the presidential selection process, see JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 264 (ed. 1887).

⁹⁴ U.S. CONST. art. II, § 1, cl. 3.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

1. The Judicial Interpretation of Article II, Section 1

In creating the Electoral College,⁹⁸ Article II, Section 1 gives the right to appoint Electors for the purpose of choosing the President and Vice President to the legislatures of the several states.⁹⁹ As such, these legislatures have broad discretion in choosing the manner in which the Electors are selected.¹⁰⁰ The Constitution “recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.”¹⁰¹ Recognized as plenary,¹⁰² state authority to “appoint [electors] in such Manner as the Legislature thereof may direct,”¹⁰³ is restricted by bounds set by the Fourteenth Amendment.¹⁰⁴ Moreover, despite controlling state authority,¹⁰⁵ the electors retain constitutional discretion to vote for any candidate.¹⁰⁶

⁹⁸ See James M. Rose, *The Electoral College: One Person No Vote?* 23 WESTCHESTER B.J. 71 (1996) (describing the origin of the use of the term “Electoral College”).

⁹⁹ See *Ray v. Blair*, 343 U.S. 214, 224 n.11 (1952) (citing *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)). *McPherson* is the seminal case regarding the power of the state legislatures with respect to the appointment of electors and was conspicuously absent from the district court’s analysis of the function of Article II, Section 1.

¹⁰⁰ See *McPherson*, 146 U.S. at 28–29 (1892).

[O]n reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways.

Id.

¹⁰¹ *Id.* at 27 (1892).

¹⁰² See *id.* at 35 (opining that the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors).

¹⁰³ U.S. CONST. art. II, § 1.

¹⁰⁴ See *Oregon v. Mitchell*, 400 U.S. 112 (1970).

¹⁰⁵ Currently, either state law or pledges to a political party to vote for a particular candidate, do not bind the electors of twenty-five states. Moreover, state laws that do bind electors are constitutionally suspect. See *Ray v. Blair* 343 U.S. 214, 224–25 (1952). What binds the electors is only party loyalty and tradition. Significantly, the remedy for a faithless elector is not to discount that vote in Congress. See Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 732 (1996).

¹⁰⁶ See *Blair*, 343 U.S. at 231 (holding a pledge on the part of a candidate for elector in a state party primary to support the party candidate should his particular candidate lose constitutional).

Despite these constitutional limitations, the right to appoint electors to choose the President remains with the several states, and the people, through the legislative grace of their respective states, thereby exercise their right to vote in the presidential election.¹⁰⁷ A United States citizen's right to vote for President remains unmistakably dependent upon, and is exercised through, residence in a particular state.

2. Article II as Interpreted by the *Igartua de la Rosa* court

The *Igartua de la Rosa* court dismissed the express provisions of Article II as they "merely set...forth the mechanism by which the right to vote [for President] is implemented in the states."¹⁰⁸ Specifically, the court dismissed the applicability of Article II to Puerto Rico because it "speaks to the way in which residents of the *states* participate in Presidential elections,"¹⁰⁹ but it does not "preclude United States citizens in Puerto Rico from voting in Presidential elections."¹¹⁰ Since Puerto Rico is not a state, but rather "an unincorporated territory belonging to the Union, its residents would not participate in Presidential elections pursuant to that constitutional clause."¹¹¹ Dismissing the clause as "the logistics by which the electors of the states elect the President and Vice President,"¹¹² the court declared that "[t]he right to vote is a function of citizenship and a fundamental right preservative of all other rights."¹¹³ In so holding, the court opened the federal poll for those disenfranchised U.S. citizen residents of Puerto Rico, and proclaimed the right to vote for President to be guaranteed by the Constitution,¹¹⁴ rather than limited by the express terms of Article II, Section 1.

¹⁰⁷ See *McPherson*, 146 U.S. 1 at 27 (recognizing that the Constitution enables people to act through their representatives in the legislature).

¹⁰⁸ *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 145 (D.P.R. 2000).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *Igartua de la Rosa v. United States*, 113 F. Supp. 2d 228 (D.P.R. 2000). The court also cited those "principles entrenched in the Bill of Rights," as well as the Ninth Amendment's protection of unenumerated rights. See *id.* at 232-35.

3. The Flawed Analysis of Article II Presented in *Igartua de la Rosa*

In distinguishing Article II as a mechanism by which the right to vote is implemented in the states, the court failed to recognize that Article II gives the right to select the President to the several states, and not to the citizenry of the several states.¹¹⁵ The terms do not create a mechanism, nor do they express a mere logistical scheme used to express the popular choice of the citizenry. To dismiss them as such is erroneous.¹¹⁶ Only the electors of the several states possess the legal ability to choose the President,¹¹⁷ and despite state law binding them in several of the states to vote for the candidate to whom they are pledged, they remain constitutionally free to vote as they choose.¹¹⁸ The popular choice of the citizenry is an irrelevancy, unless granted relevancy through actions of a state legislature.¹¹⁹ As such, the citizen's right to vote for President exists only to the extent that it is provided for by the state legislatures.¹²⁰ Without authority to appoint electors, the

¹¹⁵ See *id.* at 232 (“[A] U.S. citizen and stateside resident’s right to vote in Presidential elections is not derived from Article II, section 1, clause 2 . . . but rather arises from the principals entrenched in the Bill of Rights.”). But see *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”).

¹¹⁶ See, e.g., *Ray v. Blair*, 343 U.S. 214, 231 (1952) (standing for the proposition that electors can pledge to vote for a particular candidate or the candidate of a party without interfering with an elector’s constitutional freedom).

¹¹⁷ See *In re Green*, 134 U.S. 377, 379 (1890) (“The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation.”).

¹¹⁸ See *Blair*, 343 U.S. at 220 n.4.

¹¹⁹ See *Bush*, 531 U.S. at 104 (declaring that the individual citizen has no federal constitutional right to vote for electors for the President, unless and until the State legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College).

¹²⁰ See *McPherson v. Blacker*, 146 U.S. 1, 34–35 (1892) (citing S. REP. NO. 43-395).

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor or the Supreme Court of the State, or any other agent of its will, to appoint these electors. The power is conferred upon the legislatures of the States by the Constitution of the

government of Puerto Rico is without power to extend the right to participate in presidential elections to its citizenry¹²¹ as is a federal court. Moreover, for a court to do so is violative of the political question doctrine.

C. *The Political Question Doctrine*

In considering the issue of non-justiciability, the court's analysis is not immediately precluded, but "necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."¹²² Consequently, "[t]he political question doctrine does not deprive courts of jurisdiction over a case."¹²³ Rather, "it precludes courts from granting relief that would violate the separation of powers mandated by the United States Constitution."¹²⁴ In defining an analytical framework for delineating a non-justiciable political question, the U.S. Supreme Court stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away or abdicated.

Id. The action by the Florida legislature to appoint a slate of electors when the results of the November 2000 election were contested and threatened to disenfranchise the state in the Electoral College illustrates the plenary powers of state legislature to choose the manner in which a state's electors are chosen. The legislative action in Florida was inchoate and rendered moot by the decision in *Bush* and most certainly would have been subjected to a court challenge. *See Bush*, 531 U.S. at 110.

¹²¹ *See Igartua de la Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994) (noting that only a constitutional amendment or grant of statehood to Puerto Rico could provide people with the right to vote in presidential elections).

¹²² *Baker v. Carr*, 369 U.S. 186, 198 (1962).

¹²³ *Brown v. Hansen*, 973 F.2d 1118, 1121 (3d Cir. 1992) (citing *Powell v. McCormack*, 395 U.S. 486, 516 (1968)).

¹²⁴ *Brown*, 973 F.2d at 1121 (citing *Powell*, 395 U.S. at 517).

resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹²⁵

Absent a finding that one of these "formulations is inextricable" from the issue presented, a case involving the presence of a political question should not be dismissed as non-justiciable.¹²⁶ Moreover, if the essence of a claim is that of a political question, characterizing it as a deprivation of some other constitutional right does not render it any less of a political question.¹²⁷

The issue presented in *Igartua de la Rosa* is essentially a non-justiciable political question as measured by the contours of the political question doctrine,¹²⁸ and the court erred in not recognizing and treating the issue as such.¹²⁹ Granting the requested relief could not be judicially molded without violating the separation of powers doctrine.¹³⁰ This becomes manifest when the relief granted by the district court is given careful scrutiny. Although the court recognized the political nature of the case,¹³¹ it failed to recognize and consider several of the

¹²⁵ *Baker*, 369 U.S. at 217.

¹²⁶ *Id.*

¹²⁷ *See id.* at 228.

¹²⁸ *Igartua de la Rosa v. United States*, 842 F. Supp. 607, 609–11 (D.P.R. 1994) (holding a determination of whether Puerto Rico is a "*de facto*" state is fundamentally a political question inappropriate for judicial resolution). In the earlier litigation, plaintiff sought the right to vote for President as remedy for alleged deprivation of his right to vote. In the instant matter, the requested relief is fundamentally the same, although the complaint alleges other deprivations of constitutionally protected rights and seeks the appointment of electors.

¹²⁹ *See Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140 (D.P.R. 2000).

¹³⁰ *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (citing *United States v. Classic*, 313 U.S. 299, 315 (1941)) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and to have them counted."). When the right to vote is seen in its totality, the court is clearly without power to create a remedy to vindicate the right, given the terms of Article II, Section 1, as well as the commitment to Congress of the authority to certify and count electoral votes.

¹³¹ *See Igartua de la Rosa*, 107 F. Supp. 2d at 148.

What has stood in the way of the U.S. citizens living in Puerto Rico from reaching the ballot box, however, is the incompatibility of Puerto Rico's [political] status with the Constitution . . . [u]ltimately it is this political conundrum that has characterized the present status of Puerto Rico: a status of subordination through disenfranchisement.

Id.

formulations held to be prominent when presented with a political question issue.¹³² Such formulations were manifest in *Igartua de la Rosa*, and the court consequently erred by propounding the existence of a right it is without power to vindicate.¹³³

Specifically, there is a textually demonstrable grant of authority to Congress to admit new states into the union,¹³⁴ and thereby giving Congress the only express authority to extend the federal franchise without constitutional amendment. Contrary to this express grant of authority, the court declared U.S. citizens residing in Puerto Rico to have a right reserved by the Constitution to the several states based on residency within such a state.¹³⁵ There is also a textually demonstrable constitutional grant of authority to Congress to enact the rules and regulations required to govern the territories belonging to the United States.¹³⁶ Judicially mandated participation in presidential elections by U.S. citizen residents of Puerto Rico conflicts with powers granted to Congress by the Territory Clause and violates the separation of powers doctrine.

There is also a manifest need for an initial policy determination of a kind clearly for non-judicial discretion, as the history of Puerto Rico shows no clear manifestation on the part of its citizenry to join the Union and thereby to participate in presidential elections.¹³⁷ The issue presented in *Igartua de la Rosa* is inextricably intertwined with the political question presented by the territorial status of Puerto Rico.¹³⁸ Moreover,

¹³² See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹³³ See U.S. CONST. art. II, § 1.

¹³⁴ See *id.* art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . .").

¹³⁵ See *id.* art. II, § 1; see also *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994).

¹³⁶ See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States . . ."). As Puerto Rico is an "unincorporated territory belonging to the United States," the clause maintains contemporary applicability. *Igartua de la Rosa*, 107 F. Supp. 2d at 143 (citing *Harris v. Rosario* 446 U.S. 651 (1980)).

¹³⁷ The political history of twentieth century Puerto Rico appears to be littered with inconclusive votes and referendum on the question of the political status of Puerto Rico. See, e.g., S. Res. 472, 105th Cong. (1997) ("To provide for referenda in which the residents of Puerto Rico may express democratically their preferences regarding the political status of the territory, and for other purposes.").

¹³⁸ See *Igartua de la Rosa*, 107 F. Supp. 2d at 140.

on the face of the decision was an obvious risk of the embarrassment of multifarious pronouncements by various departments on one question, which became a reality when, on the basis of this decision, the Congress of Puerto Rico passed legislation authorizing the printing of and casting of ballots in the 2000 presidential election, without a means to have them included in the national total.¹³⁹ Finally, the district court showed a manifest lack of respect due Congress, given that institution's constitutional role in the presidential selection process.¹⁴⁰ Because of the inextricable nature of the political question surrounding the legal status of Puerto Rico with the complaint in *Igartua de la Rosa*, the court was without power to grant the requested relief, and erred when it attempted to do so.¹⁴¹ Moreover, this should have been recognized on appeal, and the failure to do so constitutes a second, compounding error.

II. THE ERRONEOUS RULING BY THE FIRST CIRCUIT COURT OF APPEALS

The First Circuit Court of Appeals erred by not ruling on the merits of the district court's ruling in *Igartua de la Rosa*, given the nature and magnitude of the district court's flawed legal analysis. The district court's interpretation of both the right to vote and the function of Article II, Section 1 were so contrary to accepted legal doctrine, that the court should have addressed and discounted the rationale. Moreover, the district court's final order and opinion clearly showed through the remedial provisions it contained that the issue in *Igartua de la Rosa* was a

¹³⁹ See *Igartua de la Rosa v. United States*, 229 F.3d 80, 83 (1st Cir. 2000) (explaining how the Legislature of Puerto Rico enacted a law for the purpose of allowing U.S. citizen residents of Puerto Rico to vote in the presidential election, but failed to provide a means for the results to be included in the national total of the electoral votes that elect the President). The court holding is inconsistent with the present position of Congress that does not recognize Puerto Rico as a state.

¹⁴⁰ See *Igartua de la Rosa v. United States*, 113 F. Supp. 2d 228, 240–42 (D.P.R. 2000) (treating the issue of the district court's ability to issue an injunction against Congress in order to force the counting of the Electors from Puerto Rico appointed as a result of the court's final order).

¹⁴¹ See *Igartua de la Rosa*, 107 F. Supp. 2d at 148 ("What has stood in the way of the U.S. citizens living in Puerto Rico from reaching the ballot box, however, is the incompatibility of Puerto Rico's status with the Constitution."). This status is the "crux" of the complaint, not "whether the inability of United States citizens residing in Puerto Rico to vote in presidential elections is unconstitutional" as the court maintains. *Id.* at 144.

non-justiciable political question,¹⁴² as it was when the issue was presented in the First Circuit in 1994.¹⁴³ Rather than address the merits presented in the second litigation, the Court of Appeals rested on its earlier decision, which correctly interpreted Article II, Section 1, but failed to properly address the question at issue in the context of the political question doctrine.¹⁴⁴

The failure to recognize the non-justiciability of the issue in 1994 predicated the subsequent litigation. The plaintiffs had no choice but to bring the litigation given the detestable unfairness and continuing injustice of keeping U.S. citizen residents of Puerto Rico un-enfranchised.¹⁴⁵ The distinction drawn by the plaintiffs and recognized by the district court is entirely logical, given the earlier holding.¹⁴⁶ The two cases presented different issues, but the relief requested was effectively the same. It is the inability of the judiciary to supply the requested relief in both instances that makes both questions non-justiciable. The Court of Appeals rested on *res judicata* and *stare decisis*, without hearing the merits of the case. As a result, it missed the

¹⁴² See *Igartua de la Rosa v. United States*, 229 F.3d 80, 88 (1st Cir. 2000) (Torruella, J., concurring) ("The present conundrum cannot be justified or perpetuated further under the subterfuge of labeling it a 'political question.'"). In recognizing and refusing to label the issue a non-justiciable political question, the judge's eloquent dissent states that "the particular issue of the presidential vote is governed by explicit language in the Constitution providing for the election of the President and Vice President by the states, rather than by individual citizens." *Id.* at 90. Recognition that the power to provide the plaintiffs with their requested relief was reserved to Congress would have properly completed the analysis.

¹⁴³ See *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994).

¹⁴⁴ See *id.* at 9.

¹⁴⁵ See *Igartua de la Rosa*, 229 F.3d at 90 (Torruella, J., concurring) (calling the un-enfranchisement "an outrageous disregard for the rights of a substantial segment of its citizenry"). The unexhausting nature of the lead plaintiff is manifest, and one would presume that if he is clever enough to raise the issue twice, the matter could be brought up again, albeit in a different context. See, e.g., *Romeu v. Cohen*, 121 F. Supp. 2d 264 (S.D.N.Y. 2000) (holding a New York citizen who moved to Puerto Rico was not entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act).

¹⁴⁶ See *Igartua de la Rosa*, 229 F.3d at 82. The justiciability of the claim based on the political question doctrine was not addressed in the final decision, as it had been in the district court. See *Igartua de la Rosa v. United States*, 842 F. Supp. 607, 609-10 (D.P.R. 1994). In a real sense, the court misinterpreted the nature of the plaintiffs' question, which centered entitlement to voting rights for U.S. citizen residents of Puerto Rico on a claim of *de facto* statehood, rather than simply the individual citizen's right to vote for President. In doing so, the court missed an essential nuance presented by the case, and effectively rendered an advisory opinion, rather than effectively settling the matter with an application of the political question doctrine.

opportunity to state clearly that the courts were not the proper forum for redress, and thus shift the focus of the matter to the proper governmental institution.

III. BEYOND THE LEGAL: THE REAL MESSAGE OF *IGARTUA DE LA ROSA*

The importance of the *Igartua de la Rosa* decision rests not in its immediate holding, but rather in the values and principals embodied in it¹⁴⁷ as well as its potential catalytic effect on the presidential election process. The decision rejects the manifest inequality established and perpetuated by American jurisprudence as reflected in voting rights.¹⁴⁸ The decision highlighted a perceived inconsistency between the fundamental nature of the right to vote and Article II, Section 1 of the Constitution. This, coupled with the systemic deficiencies of the electoral process illustrated by the presidential election of 2000, effectively point toward a constitutional amendment eliminating the Electoral College as a remedy for the un-enfranchised status of U.S. citizen residents of the several territories.¹⁴⁹ Removing this vestige and establishing a direct vote for President based on citizenship status rather than the political status of one's residence, would end voting disparity. Furthermore, it would resolve the inconsistency between the judicial interpretation of the fundamental nature of the right to vote and Article II, Section 1.

A. *The Historic Underpinnings of Territorial Inequality: The Insular Cases*

The Spanish Empire ceded Puerto Rico, the Island of Guam, and the Philippine Archipelago to the United States after losing

¹⁴⁷ See *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 141 (D.P.R. 2000). The court stated:

The present political status of Puerto Rico has enslaved the United States citizens residing in Puerto Rico by preventing them from voting in Presidential and Congressional elections and therefore is abhorrent to the most sacred of the basic safeguards contained in the Bill of Rights of the Constitution of the United States—freedom.

Id.

¹⁴⁸ See *id.* at 149–50.

¹⁴⁹ See *id.* (interpreting Article II, Section 1, as a barrier to territorial resident citizens exercising the federal franchise, but not questioning its validity as applied to the several states).

the Spanish American War of 1898.¹⁵⁰ Relative to other United States citizens, inequality quickly attached to the inhabitants of Puerto Rico.¹⁵¹ The likely cause was a combination of scholarly debate,¹⁵² specific acts of the U.S. government,¹⁵³ and a series of Supreme Court cases decided beginning in 1901. Known as the Insular Cases,¹⁵⁴ these nine decisions¹⁵⁵ resulted in a delineation

¹⁵⁰ See Treaty of Peace Between the United States of America and the Kingdom of Spain, Dec. 10, 1898, 30 Stat. 1754 (noting the treaty is commonly referred to as the Treaty of Paris); see also *Igartua de la Rosa*, 107 F. Supp. 2d at 142. In addition to the territorial acquisitions, the United States established a protectorate over Cuba, where a rebellion against Spanish authority, the destruction of the U.S. battleship Maine in Havana Harbor, and the consequential screaming headlines of hideous horror in newspapers, all served to precipitate the war.

¹⁵¹ See generally Gabriel A. Terrasa, *The United States, Puerto Rico and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism* 31 J. MARSHALL L. REV. 55 (1997). Geopolitical concerns regarding defense of the Panama Canal, racism, as well as the overall imperialist swagger with which the industrialized nations carried themselves at the time, resulted in the retention of Puerto Rico by the United States as a territory, rather than receiving a grant of independence that was immediately assumed to be the destiny for both the Philippines and Cuba. Other considerations against independence for Puerto Rico included the size of the island. See *id.*

¹⁵² See *id.* at n.34.

The academic debate . . . developed three different views:

1) The Constitution applied to the Territories *ex proprio vigore* and Congress therefore lacked the power to permanently hold territories without annexing them into the Union, 2) The Constitution only applied to States and thus Congress had plenary power over the Territories, 3) The document effecting the transfer of sovereignty over a Territory determined whether the Constitution applied to the acquired Territory (the "incorporation theory").

Id. (internal citations omitted) (emphasis added).

¹⁵³ See, e.g., Foraker Act, 31 Stat. 77 (codified as amended 48 U.S.C. §§ 733, 736, 738–40, 744, 864 (2000) (establishing a civil government for Puerto Rico and ending a two year military occupation)); see also Jones Act, ch. 190, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 731 (1987)) (granting U.S. citizenship to the inhabitants of Puerto Rico); *Rogers v. Bellei*, 401 U.S. 815 (1971) (holding Congress could rescind any grant of citizenship granted by statute). The grant of citizenship to residents of Puerto Rico is statutory rather than Constitutional. This is also true for residents of the several states who are defined to be citizens in the Fourteenth Amendment.

¹⁵⁴ See, e.g., *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetz v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huss v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 151 (1901); see also Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, n.74. (1998).

¹⁵⁵ See Efrén Riveria Ramos, *The Legal Construction of American Colonialism:*

as to which constitutional rights were applicable to the inhabitants of U.S. Flag Territories.¹⁵⁶ The Territorial Incorporation Doctrine¹⁵⁷ was a product of, and rationale for, the various holdings of the Insular Cases.¹⁵⁸ Under this doctrine,¹⁵⁹ Congress, through its power to regulate the Territories belonging to the United States, was able to disparately treat the U.S. citizen residents of Puerto Rico.¹⁶⁰

The Insular Cases (1901-1922), 65 REV. JUR. U.P.R. 225, 240-41 (1996). Thirteen additional Supreme Court cases decided between 1903 and 1914 can arguably be included with the Insular Cases because of their subject matter. *See* Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Ochoa v. Hernandez, 230 U.S. 139 (1913); Dowdell v. United States, 221 U.S. 325 (1911); Kopel v. Bingham, 211 U.S. 468 (1909); Kent v. Porto Rico, 207 U.S. 113 (1907); Grafton v. United States, 206 U.S. 333 (1907); Trono v. United States, 199 U.S. 521 (1905); Rasmussen v. United States, 197 U.S. 516 (1905); Mendezona v. United States, 195 U.S. 158 (1904); Dorr v. United States, 195 U.S. 138 (1904); Kepner v. United States, 195 U.S. 100 (1904); Gonzales v. Williams, 192 U.S. 1 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903).

¹⁵⁶ *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 268 (1901) (stating that Congress, as a result of Article VI, Section I, had plenary powers over the territories subject to "fundamental limitations in favor of personal rights"). The Court also noted that there was an undefined spectrum of personal rights to which limitations might apply. *See id.* Moreover, it is arguable that the right to vote is not a personal one, but a political one that would conceivably fall outside the spectrum of protected personal rights. *See id.*; *see also* *Yick Wo v. Hopkins* 118 U.S. 356 (1886).

¹⁵⁷ *See Downes*, 182 U.S. 244 at 289-90 (White, J., concurring) (concurring with the rationale that Congress was limited in its capacity to legislate for the territories by applicable portions of the Constitution). Which particular provisions applied were a function of "the situation of the territory and its relations to the United States." *Id.* at 293. In his concurrence, Justice White stated that Congress had, through its power to make war and treaties, the power to acquire new territories. The decision on whether to incorporate these new territories into the union was not the automatic end of acquiring territory, but rather a volitional decision on the part of Congress to share with "the alien people" the "rights which peculiarly belong to the citizens of the United States." *Id.* at 324. Stating that there had been no intention to incorporate the territory of Puerto Rico into the United States, Justice White believed Congress retained the right to determine the status of Puerto Rico and the rights of its inhabitants. *See id.* at 339-40.

¹⁵⁸ *See, e.g.*, *Dorr v. United States*, 195 U.S. 138, 149 (1904) (establishing the territorial incorporation doctrine as the majority position of the Court).

¹⁵⁹ *See* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 449 (1992) (dividing possible political status among U.S. possessions as either incorporated—meaning the territory is slated for acceptance into the union as a state, in which case the provisions of the Constitution are fully applicable; or unincorporated—meaning the territory is not slated for acceptance into the union as a state and Congress retains the power to determine which constitutional provisions apply). Puerto Rico, Guam, Northern Marianas Islands and American Samoa are considered to be unincorporated territories. *See id.* at 450.

¹⁶⁰ *See* Balzac v. Porto Rico, 258 U.S. 298 (1922). (holding the rights

B. *The Insular Cases in Contemporary American Jurisprudence*

Despite a fundamental change in the political relationship between the United States and Puerto Rico in 1950,¹⁶¹ the rationale of the Insular Cases remains a part of contemporary American jurisprudence. In 1951, the Supreme Court reaffirmed the Territorial Incorporation Doctrine and held certain constitutional protections were not applicable to the territories.¹⁶² The Court has reaffirmed that Congress, through the Territory Clause, controls the relationship between the United States and Puerto Rico. It has held only fundamental constitutional rights apply to the territories.¹⁶³ The rationale of the Insular Cases also serves as the basis for disparate treatment for U.S. citizen residents of Puerto Rico in relation to certain government economic benefits.¹⁶⁴ The continued viability of the holdings in the Insular Cases serves to perpetuate a perverse colonial system that subjugates its own citizens.

accompanying American citizenship are a function of political status, the Supreme Court effectively gutted the statutory grant of citizenship provided to the residents of Puerto Rico embodied in the Jones Act, ch. 190, 39 Stat. 951 (1917) (codified at 48 U.S.C. § 731 (2001)) by linking citizenship to venue; thereby creating degrees of citizenship within the general body of U.S. citizenry).

¹⁶¹ See Pub. L. No. 81-600, 64 Stat. 319 (1950) (granting "commonwealth" status to Puerto Rico). For a time there was a divergence of opinion as to whether this new statute resulted in the end of Congressional power over Puerto Rico under the Territory Clause. See *id.*; see also *Popular Democratic Party v. Commonwealth of Puerto Rico*, 24 F. Supp. 2d 184, 193 (D.P.R. 1998) (citing *Mora v. Mejias*, 206 F. 2d 377 (1st Cir. 1953)) (stating that by the terms of Pub. L. No. 81-600, 64 Stat. 319 (1950), Congress had granted away its plenary powers under the territory clause). The court in *Mejias* adopted the "compact theory" which loosely held the compact between the United States and the people of Puerto Rico altered the basic political relationship. See *Mejias*, 206 F.2d at 387-88. The compact theory was short lived.

¹⁶² See *Reid v. Covert*, 354 U.S. 1, 16 (1957) (relying on cultural differences as justification for endorsing the continued applicability of the territory incorporation doctrine).

¹⁶³ See *Balzac*, 258 U.S. at 298 (holding that the Fifth Amendment right to a grand jury indictment and the Sixth Amendment right to trial by jury are not fundamental and therefore do not apply to unincorporated territories).

¹⁶⁴ See *id.* The Court held the Fifth Amendment's Equal Protection Clause was not violated by the lower levels of aid to dependent children (ADC) provided by the federal government to the residents of Puerto Rico as compared to the residents of the several states. See *id.* The Court, reaffirming the validity of Congressional power over Puerto Rico through the Territory Clause, held the statute should be reviewed using the rational basis standard rather than a heightened standard of judicial scrutiny because of Congressional authority to regulate the territories. See *id.* at 652.

C. *Challenging the Rationale of the Insular Cases*

An inherent value in the district court holding in *Igartua de la Rosa* lies in its rejection of inequality manifest in the authority of the Insular Cases that evolved into a doctrine of subjugation.¹⁶⁵ Rather than accepting the rationale justifying the treatment of U.S. citizen residents of the territories as much less than citizens,¹⁶⁶ the district court decided the issue in favor of those individuals who possess an inferior grade of U.S. citizenship.¹⁶⁷ The rationale of the Insular Cases is clearly inconsistent with contemporary notions of due process and equal protection. It serves to subjugate a "discrete and insular minority."¹⁶⁸ It serves as a legal basis for treating a population of U.S. citizens as less than citizens by affording them only certain fundamental rights. The district court's opinion strongly asserts the fundamental values of equality and freedom as basic tenants of the American political system,¹⁶⁹ and, as such, the court disavowed the validity of a system it finds abhorrent.¹⁷⁰

The district court opinion in *Igartua de la Rosa* illustrates the need to address and reform this segment of American political life where colonialism prevails.¹⁷¹ Contemporary

¹⁶⁵ See *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 147 (D.P.R. 2000).

¹⁶⁶ See Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories* 59 U. CHI. L. REV. 779, 794-96 (1998).

¹⁶⁷ See Nelson D. Hermilla, *Puerto Rico 1898-1998: The Institutionalism of Second Class Citizenship?*, 16 DICK. J. INT'L L. 257 (1998).

¹⁶⁸ *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

¹⁶⁹ See *Igartua de la Rosa*, 107 F. Supp. 2d at 145. The court stated:

The United States Constitution forever changed the history of humanity when it did away with human bondage. It did away with slavery, and in doing so, vindicated the principle that all men are created equal. The inability to vote represents a form of slavery, as it subordinates the will of the people.

Id.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 149.

It is precisely because of the inchoate and colonial nature of the present status that Puerto Rico's present relationship with the United States must evolve into one of political dignity, which does not infringe upon the freedom of the United States citizens residing in Puerto Rico. Any status formula that hinders freedom insofar as it does not guarantee the participation of U.S. citizens residing in Puerto Rico in Congressional and Presidential elections is unconstitutional . . . and cannot be included as one of the options, because slavery, even if voluntary, is repugnant to the concept of freedom which is the essence of the U.S. Constitution.

Id.

principals of equality, which have characterized the development of American jurisprudence during the twentieth century, have not yet been established. Clearly there is a need for "a more searching judicial inquiry"¹⁷² in order to protect "a discrete and insular minority"¹⁷³ that is denied its full benefit of U.S. citizenship by a jurisprudence that was discarded long ago.¹⁷⁴ Moreover, the case illustrates the need for non-judicial reform that will enable the U.S. citizen residents of Puerto Rico to vote in presidential elections, by ending an archaic institution that is obnoxious to the basic tenants of modern democracy—the Electoral College.

IV. ELECTORAL COLLEGE REFORM AS A MEANS TO ENDING THE CITIZENSHIP DISTINCTION IN VOTING RIGHTS.

Each time the inability of U.S. citizen residents of the territories to vote for President is challenged on constitutional grounds, or a version of the issue is presented for adjudication, the respective courts cite the need for a constitutional amendment as a remedy,¹⁷⁵ with the exception of the district

¹⁷² *Carolene Products*, 304 U.S. 144 at 152 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry."); see also *Igartua de la Rosa v. United States*, 229 F.3d 80, 83 (1st Cir. 2000) (Torruella, J., concurring). In citing *Carolene Products*, Judge Torruella noted an instance of a more searching judicial inquiry, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The judge noted the instant matter was not a suitable one for a more searching judicial inquiry because of the express terms governing presidential selection. It is manifest, as the concurrence hints, that a more searching judicial inquiry is needed for all matters that pertain to the rights of U.S. citizen residents of Puerto Rico, and by implication, other U.S. territories. The Constitution does not form such an express bar because of the territories' residents' lack of representation in the ordinary course of the American political process.

¹⁷³ *Carolene Products*, 304 U.S. 144 at 152 n.4. Arguably, a more fitting example other than U.S. territorial residents cannot be found.

¹⁷⁴ See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁷⁵ See *Sanchez v. United States*, 376 F. Supp. 239, 242 (D.P.R. 1974) (stating the need for a vote for statehood by the residents of Puerto Rico, or a constitutional amendment extending the presidential vote); see also *Attorney General of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) ("[A] constitutional amendment would be required to permit plaintiffs to vote in a presidential election"); *Igartua de la Rosa v. United States*, 842 F. Supp. 607, 609 (D.P.R. 1994) ("[G]ranting U.S. citizens residing in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a state, or that a constitutional amendment, similar to the Twenty-Third Amendment, be adopted."); *Romeu v. Cohen*, 121 F.

court in *Igartua de la Rosa*.¹⁷⁶ As a result of this bar, the respective courts have offered only verbal support as relief to the cause represented by the plaintiffs.¹⁷⁷ The most often cited relief is either an amendment similar to the Twenty-Third, or statehood for Puerto Rico.¹⁷⁸

Rather than amending the Constitution similarly to the Twenty-Third Amendment or altering the political status of Puerto Rico,¹⁷⁹ the most effective means of providing relief and extending the federal franchise to all territorial residents, would be an amendment to the Constitution eliminating the Electoral College. In its place, Congress should provide for direct election of the President, with participation prefaced on U.S. citizenship, rather than state residency. Establishing the right to vote as a function of citizenship would end a citizen's dependency upon a particular political entity for the right to exercise the franchise. It would also end the inconsistency between case holdings declaring the right to vote fundamental and strictly reading Article II, Section 1.¹⁸⁰ Moreover, it would end an institution

Supp. 2d 264, 267 (S.D.N.Y. 2000) (stating that "only a constitutional amendment or Puerto Rican statehood can provide the cure").

¹⁷⁶ See *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 148 (D.P.R. 2000).

¹⁷⁷ See, e.g., *Sanchez*, 376 F. Supp. at 242 ("The Court shares in the expression of these views and is of the opinion that it is inexcusable that there still exists a substantial number of U.S. citizens who cannot legally vote for the President and Vice President of the United States."); *Romeu*, 121 F. Supp. 2d at 268.

¹⁷⁸ This much debated and problematic option is beyond the scope of this comment and is not treated except in a collateral fashion.

¹⁷⁹ It is conceivable that a proposed amendment could be crafted to include all residents of U.S. territories, though this solution would present apportionment problems within the Electoral College. If a delegation of electors were assigned to represent all territorial residents at large, the differing political interests present between communities separated by vast distances might not be properly addressed. Apportioning electors for each territory would add at least fifteen new electors to the college (assuming the pattern set by the Twenty-Third Amendment were followed). A case could be made that the small populations of certain of these territories were over represented, as compared with Puerto Rico, whose approximate 3.8 million citizen residents would possess the same number of seats in the Electoral College. This would present a similar problem as was presented in the voter apportionment cases. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964). Rather than changing the political status of all the territories involved, eliminating the Electoral College makes that status irrelevant for the purposes of the presidential election.

¹⁸⁰ See *Attorney General of Guam v. United States*, 738 F.2d 1017, 1018-19 (9th Cir. 1984) (holding U.S. citizens residing in the territories cannot vote in election for President or Vice President).

that is counterintuitive to the inherent principles of American democracy,¹⁸¹ as well as the evolution of constitutional thought.¹⁸²

A. *The Contemporary Electoral College*

The original system that delegated the responsibility for choosing the President to the several states has maintained legal legitimacy, despite the revolution in perceptions regarding the nature of the right to vote.¹⁸³ The reasons for the creation of the Electoral College are well documented,¹⁸⁴ and it is also recognized as never having functioned as designed.¹⁸⁵ The Electoral College has been much maligned¹⁸⁶ and the need for its continued existence questioned.¹⁸⁷ The presidential electoral

¹⁸¹ See *Penton v. Humphrey*, 264 F. Supp. 250, 251 (S.D. Miss. 1967) (quoting *Gray v. Sanders*, 372 U.S. 368, 380 (1963)) ("The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the [E]lectoral [C]ollege in the choice of a President."). The use of weighted voting is contrary to the development and adherence to the doctrine of one person, one vote and remains viable as a result of the constitutional sanction.

¹⁸² See *Igartua de la Rosa v. United States*, 107 F. Supp. 2d. 140, 148 (D.P.R. 2000).

¹⁸³ See U.S. CONST. art. II, § 1, *amended* by U.S. CONST. amend. XII. The Twenty-Third Amendment also alters the text of Article II, Section 1 to the extent it provides electors to a political entity that is not a state.

¹⁸⁴ See THE FEDERALIST NO. 68 (Alexander Hamilton). Hamilton states:

It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation and to a judicious combination of all the reasons and inducements, which were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to make such complicated investigations.

It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder.

Id.

¹⁸⁵ See *Ray v. Blair*, 343 U.S. 214, 233 (1952) (Jackson, J., dissenting).

¹⁸⁶ See *id.* at 232 ("Electors, although eminent, independent, and respectable, officially became voluntary party lackeys and intellectual non-entities As an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis*.").

¹⁸⁷ See *id.* at 234.

system effectively creates fifty-one separate, winner-take-all presidential elections.¹⁸⁸ Legislation has been introduced to amend the Constitution to eliminate the Electoral College,¹⁸⁹ and to replace it with a direct popular election.¹⁹⁰ To do so would be consistent with precedents that recognize the voting rights of citizens and diminish traditional aspects of states' rights.¹⁹¹

The shortcomings of the current system became obvious during the presidential election of 2000. The winner of the electoral vote was not the winner of the popular vote, and the margin of victory in the determinative state was effectively non-

The demise of the whole electoral system would not impress me as a disaster. At its best it is a mystifying and distorting factor in presidential elections which may resolve a popular defeat into an electoral victory. At its worst it is open to local corruption and manipulation, once so flagrant as to threaten the stability of the country. To abolish it and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me to gain for simplicity and integrity of our governmental process.

Id.

¹⁸⁸ Maine and Nebraska are the only exceptions to the winner-take-all system. The electoral votes in these states are assigned based on the popular vote in each of the respective state's congressional districts. See Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2531 (2001) (noting that Maine and Nebraska use the district system while all the other states use a "winner-take-all" system).

¹⁸⁹ See, e.g., H.R.J. Res. 23, 106th Cong. (1999) ("Proposing an amendment to the Constitution of the United States to abolish the [E]lectoral [C]ollege and to provide for the direct popular election of the President and Vice President of the United States.").

¹⁹⁰ See *id.*

Section 1: The President and Vice President shall be elected by the people of the several states and the District constituting the seat of government of the United States.

Section 2: The electors in each state shall have the qualifications requisite for electors of Senators and Representatives in Congress from that state, except that the legislature of that state may prescribe less restrictive qualifications with respect to residence and Congress may establish uniform residence and age qualifications.

Id. It can be seen that this particular proposal is problematic with respect to territorial residents in that it addresses the question with reference to only the citizens of the several states and District of Colombia, and yet gives state legislatures and Congress the power to change residency requirements. The proposal can be read to exclude territorial residents by the express language, or include them by the grant of authority to Congress and the several states to alter residency requirements.

¹⁹¹ See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding apportionment of congressional districts was not the exclusive domain of the state legislature and that issues of apportionment were not non-justiciable political questions); see also *Reynolds v. Sims*, 377 U.S. 533 (1964) (adhering to the one man, one vote doctrine).

existent.¹⁹² The voters of Florida faced disenfranchisement when the state legislature sought to name its own, uncontested state of electors. The United States Supreme Court was called upon to rule upon the constitutionality of the manner in which the results of the Florida election were contested. This ruling effectively, but not legally, decided the presidency, as the electors remained constitutionally free to vote for whomever they chose.¹⁹³ Several members of the House of Representatives challenged the validity of the results of the electoral vote during a joint session of Congress, which had become largely ceremonial.¹⁹⁴ Most importantly, the system functioned correctly and certified a winner who was not the choice of the majority of the citizenry.

B. *The Need For Electoral Reform*

The *Igartua de la Rosa* decision, in conjunction with the election debacle of 2000, offers a new opportunity to reflect upon and urge electoral reform. An inclusively written amendment¹⁹⁵ to the Constitution would eliminate the political status of each of the territories as a relevant factor in enfranchising those citizens residing therein. Eliminating the Electoral College offers the most efficient means¹⁹⁶ of resolving the condition of subjugation, which is perpetuated by keeping the citizens of the territories un-enfranchised for the purposes of presidential elections.

¹⁹² The Florida popular vote was effectively a tie. See *Counting the Vote*, N.Y. TIMES, Nov. 15, 2000, at A24 (noting Florida's certified results are 2,910,492 votes for Bush and 2,910,192 votes for Gore).

¹⁹³ The final tally in the Electoral College was 271 votes for George W. Bush and 266 votes for Albert Gore with one elector pledged to Albert Gore from the District of Columbia not voting to protest the lack of representation in Congress for the District of Columbia. See Walsh & Eilperin, *supra* note 30, at A1. It must be noted that a defection of two electors from the Bush majority would have thrown the election into the House of Representatives, assuming the faithless Elector from the District of Columbia had voted for Vice President Gore. See Ross & Josephson, *supra* note 105, at 745 (noting that Electors are free to use their discretion to choose any candidate they wish).

¹⁹⁴ During the counting of the electoral votes in the constitutionally mandated joint session of Congress on January 6, 2000, twenty challenges to the electoral vote from Florida were voiced, but each failed in that their respective points of order were not supported by a member of the Senate as required by 3 U.S.C. § 15 (2000). See Walsh & Eilperin, *supra* note 30, at A1.

¹⁹⁵ See, e.g., H.R.J. Res. 23, 106th Cong. (1999) (illustrating how not to extend the franchise to the territories with a constitutional amendment).

¹⁹⁶ See *Ray v. Blair*, 343 U.S. 214, 233 (1952) (Jackson, J., dissenting).

Specifically, by avoiding the issue of the political status of the territories in question, an amendment eliminating the Electoral College¹⁹⁷ would extend the franchise to U.S. citizen residents of Puerto Rico without having to resolve an intractable political issue.¹⁹⁸ It would effectively bifurcate the question of statehood for Puerto Rico, which is more of a question pertaining to political organization of an entity, from voting in presidential elections, which has evolved into a question of personal liberty. Nothing would preclude Congress from removing citizenship from current U.S. residents in Puerto Rico, should those residents choose independence.¹⁹⁹ By removing citizenship, Congress could remove the basis for participation in presidential elections from those individuals residing in a newly independent Puerto Rico.²⁰⁰

CONCLUSION

The decision of the district court in *Igartua de la Rosa* is significant, despite the erroneous legal conclusions. The court has offered the U.S. citizen residents of Puerto Rico judicial recognition of their un-enfranchised status that goes beyond mere judicial agreement with its outrageous nature. The decision illustrates significant justification to eliminate the Electoral College, which is repugnant to the principles and

¹⁹⁷ The most compelling argument for keeping the current system appears to be that without weighted voting, the populations of the smaller states would be overlooked in an effort to secure votes in the densely populated areas of the larger states. See John H. Cox, *The Electoral College Works*, CHI. TRIB., Nov. 8, 2000, at N26 (noting that the Electoral College was originally put in place to prevent large states from dominating the union). This issue could be addressed through the current system of campaign financing, by apportioning funds on the basis of state or territorial population, and conditioning the payment of those funds on a candidate's level of activity in that particular locality.

¹⁹⁸ The issue of statehood, independence, or continued Commonwealth status was addressed by a non-binding referendum in November 1993, when Puerto Rican citizens opted for continued commonwealth status by a narrow majority. Ellen Perlmutter, *Voters Reject Statehood Referendum*, PITTSBURGH POST-GAZETTE, Nov. 29, 1993, at D3 (noting that the margin of victory for continued commonwealth status over statehood was "just 37,000 out of 1.7 million ballots cast").

¹⁹⁹ See *Rogers v. Bellei*, 401 U.S. 815 (1971) (holding Congress could rescind any grant of citizenship granted by statute). As the grant of citizenship to residents of Puerto Rico is statutory rather than constitutional—unlike residents of one of the several states who are defined to be citizens in the Fourteenth Amendment—Congress has the power to revoke citizenship for residents of Puerto Rico by repealing the Jones Act.

²⁰⁰ See *id.*

aspirations asserted in the opinion, and recognized by modern democratic principles. By attempting to eradicate injustice with eloquence, reliance upon the fundamental truths contained in his decision, and the will to see another unorthodox, yet compelling justification to cure the wrong,²⁰¹ Senior Judge Pieras has moved the issue beyond the realm of a disputed political right. He has successfully elevated the issue into the realm of human rights, and effectively changed the nature of the debate.

²⁰¹ See *Romeu v. Cohen*, 121 F. Supp. 2d 264, 285 (S.D.N.Y. 2000). Judge Sheindlen repeats Judge Pireas's discussion of the underlying unfairness as follows:

Like United States citizens residing in the District of Colombia and the fifty states, those residing in Puerto Rico have fulfilled the highest calling of citizenship, fighting and dying in the battlefields in two world wars, the Korean, Vietnam and Gulf wars. Still, despite paying for citizenship with blood, U.S. citizens residing in Puerto Rico have not entered the Presidential ballot box. It is inconceivable to our constitutional order to expect the government can place our nation's sons and daughters in harm's way and not recognize the power of those individuals to have a say in electing those who will make that decision.

Id. (quoting *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140, 145 (D.P.R. 2000)).